No. 82-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, (AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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INTRODUCTION

The parties have filed with this Court a joint motion to defer consideration of the petitions for certiorari herein and in the companion cases (Nos. 82-1143, 82-1146 and 82-1147) pending a notification from the District Court as to whether the parties' Settlement Agreement will be approved. Such approval is required because the instant suit was filed as a class action. The Agreement, as the motion states, is conditioned upon this Court's deferral of the petitions for certiorari; any action by this Court on those petitions would alter the *status quo ante* and thereby affect the decision of the class members as to whether they should accept or reject the settlement. Moreover, and equally obviously, avoidance by the parties of the respective risks of a grant or denial of certiorari

motivated their willingness to settle. Accordingly, the public interest in the settlement of litigation would be served by the granting of the motion and the deferral of consideration of the petitions. We file the instant Reply Memorandum not in order to deviate in any respect from the prayer of the aforementioned joint motion, but only out of an abundance of caution, having been advised by the Clerk's Office that the petitions and the briefs in opposition have been submitted to the Court for consideration simultaneously with the joint motion.

ARGUMENT

I. THE *PER SE* ILLEGALITY QUESTION.

A. Respondents dispute (Resp. Br. 23)[1] our submission (Pet. 13-18) that the decision below conflicts with this Court's holding in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 ("CBS"). Respondents' attempted distinction of *CBS* is plainly without merit. They say:

> Here, the basis of the decision below is that the union combined with NECA to raise the prices paid by another group of competitors. In *CBS*, there was no allegation that the composers or ASCAP or BMI had combined with the *competitors* of CBS to raise CBS's prices. In the instant case, the IBEW agreed with plaintiffs' and class members' competitors to attempt to secure the 1% surcharge. This basic difference renders the *CBS* case inapposite. [Resp. Br. 23, emphasis in original]

The first sentence of the foregoing is accurate, in that defendants are charged with seeking to require non-

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[1] "Resp. Br." will refer to Respondents' Brief in Opposition to the Petitions in Nos. 82-1146 and 82-1147. "Pet." will refer to the Petition for a Writ of Certiorari filed by IBEW, *et al.* in No. 82-1147.

members of NECA to pay for the services of NECA.[2] But in their next sentence respondents quite simply misstate the facts of *CBS*. As this Court observed, BMI is "owned by members of the broadcasting industry,". CBS itself had been "a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959." (441 U.S. 5, text and note at n.4). Thus, BMI is a combination of "the competitors of CBS", whose action raised CBS' prices for music, just as NECA is a combination of contractors (its members) who, on respondents' theory, "attempt to secure the 1% surcharge" from their competitors, the nonmembers of NECA. What respondents say is the "basic difference" between this case and *CBS* is, in fact, an additional point of identity.

B. Moreover, respondents ignore the *St. Louis Terminal Railroad Association* and *Realty Multi-List, Inc.* cases, discussed at Pet. 20, which held it to be lawful for one group of competitors to charge another group of competitors for beneficial services. In those cases, as here, the agreements reduced free rider problems and thereby incerased competition (see Pet. 18-20). Respondents do contend that the 1% payment of NEIF "has no relationship to the elimination of 'free riders'" (Resp. Br. 20, upper case omitted). But the courts below did not decide this case on the basis that the 1% payment to

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[2] Even that sentence is sufficient to show that this case differs materially from the classic horizontal price-fixing arrangements wherein competitors agree to eliminate competition concerning the price which each will charge *to his own customers*, as in the cases on which respondents rely (Resp. Br. 14-17, 18-19). For example, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, the competing doctors established the prices which they would charge patients for medical services; in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, the wholesalers of beer agreed to deny credit to their retail customers; and in *United States v. General Motors, Inc.*, 384 U.S. 127, the automobile dealers conspired to eliminate competition from dealers who cut the prices charged to the purchasers of automobiles. In contrast, the NECA/IBEW National Agreement did not set prices to be charged by the contractors to their customers in the market for electrical construction services.

the NEIF exceeded the benefit actually received by non-NECA members. The reason is that the plaintiffs' theory was that they could not lawfully be required to pay *anything*, even though they benefitted from, for example, NECA's collective bargaining services. It was that position which the District Court and the Court of Appeals approved under their *per se* antitrust illegality theory, despite Judge Halls' protest in dissent against the unfairness of "the majority's ruling [that] although both assenting and non-assenting NECA contractors would continue to enjoy the benefits of NECA's bargaining, neither can be required to contribute to the fund." (Pet. App. 22a). See also *Williams v. ITT Grinnell Industrial Piping, Inc.* (E.D. Va.) reprinted at pp. 121a-125a of the Petition for Certiorari in No. 82-1146.

Respondents say, "defendants seem unable to comprehend that plaintiffs and class members do not want to belong to NECA and pay NECA dues." (Resp. Br. 21). But the agreement which the courts below struck down did not require the respondents either to belong to NECA or to "pay NECA dues". The real point is that respondents wish to get the benefits of NECA's services, without paying therefor. Even if, as respondents *now* contend, 1% is too high a charge for the "ride", the antitrust laws do not entitle them to have it for "free" under a *per se* theory of illegality. If the antitrust laws are applicable at all, the relief to which respondents are entitled would properly be determined after a trial at which they would have the burden of proving the amount of the overcharge, and under a rule of reason inquiry, any adverse impact on competition.[3] Respondents' heavy

[3] The situation of the non-NECA contractors who were not parties to a local NECA Chapter agreement (Resp. Br. 21) (the non-assenters) is not relevant to the issues in this case. There is no evidence that any of them have made the 1% payment to NEIF. Moreover, as respondents acknowledge, "the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of the Local NECA Chapter—Local IBEW Union Local Agreements" (Resp. Br. 5).

reliance on *FMC v. Pacific Maritime Ass'n.*, 435 U.S. 40 (Resp. Br. 22; see also *id.* at 16-17), is misplaced. The Court decided only that the agreement there was not exempt from the antitrust laws; it carefully observed that "it is clear that denying the exemption does not mean that there is an antitrust violation" (435 U.S. at 61; see also Pet. 26).

C. Respondents say, "Where an agreement interferes with price competition between competitors, it is *per se* an unreasonable restraint of trade, even if the effect upon prices is indirect." (Resp. Br. 18). That statement is unexceptionable, but begs the critical question of whether the NECA/IBEW agreement "interferes with price competition" as that concept has been understood in this Court's decisions, such as those cited at Resp. Br. 18. The answer to this question is that the record does not show *any* impact by the agreement on prices in the market for electrical construction services. See p. 3, n. 2, *supra*. Our contention is not, as respondents would characterize it, "that the raise in costs represented by the NEIF was reasonable, a contention which is immaterial in a price fixing case" (Resp. Br. 19), but rather that this case is not a "price-fixing" case. (Pet. 13-24). Thus, the present relevance of *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (Resp. Br. 19) is not that it is "immaterial" (*id.*) *in awarding damages under § 4 of the Clayton Act* whether costs imposed by an illegal agreement are pasesd on, but rather that the Court so held precisely because it rejected the theory that a change in costs at one level necessarily reflects a change in price at the next level (see Pet. 23).

II. THE ANTITRUST-LABOR LAW QUESTION

Respondents assert that the applicability of the nonstatutory labor exemption should not be considered "because it was not raised by the defendants before the Fourth Circuit. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144" (Resp. Br. 26). In *Adickes*, this Court said:

"Where issues are neither raised before *nor considered by the Court of Appeals*, this Court will not ordinarily consider them." (398 U.S. at 147, n.2, emphasis added). See also *Rogers v. Lodge*, 102 S. Ct. 3272, 3281, n. 10 (July 1, 1982). The Court of Appeals clearly considered the labor exemption issue:

> Merely, however, because establishment and maintenance of the industry fund may be a permissive subject of collective bargaining does not automatically exempt the IBEW from the provisions of the antitrust laws. [Pet. App. 18a-19a]

And, contrary to respondents, the issue was raised by the defendants below.[4] Indeed, defendants relied heavily on a prior Fourth Circuit decision (*Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d (C.A. 4), *cert. den.* 449 U.S. 870) which required proof of a predatory intent to establish a *Pennington*[5] violation, as did the decisions from the Fifth, Sixth and Seventh Circuits cited at Pet. 25-26. Respondents do not address the conflict between those decisions and that of the court below herein.

Moreover, respondents misread *Pennington* in a material respect when they say that the Court there "stated that neither labor law nor labor policy supports a union bargaining with one *group* about what it will seek from another *group*." (Resp. Br. 29, emphasis added). See also *id*: "* * * the union is not free to negotiate with one employer concerning the terms it will request from another." What *Pennington* actually ruled is that:

> there is nothing in the labor policy indicating that the union and the employers *in one bargaining unit* are free to bargain about the wages, hours and working conditions of *other bargaining units or to attempt to settle these matters for the entire industry.* On the contrary, the duty to bargain *unit by unit* leads

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[4] Brief of Defendants-Appellants C.A. 4, Nos. 80-1808, 80-1809, pp. 59-60, 73.

[5] *Mine Workers* v. *Pennington*, 381 U.S. 657.

> to a quite different conclusion. [381 U.S. at 666, emphasis added)

The difference between what petitioners assert and what *Pennington* decided is critical on the facts of this case and to Congress' policy favoring the stability of multi-employer bargaining units (see Pet. 26-27).

Because industry funds have been held to be nonmandatory subjects of collective bargaining, respondents assert flatly that "the [labor] exemption would not apply" (Resp. Br. 27). However, this Court expressly reserved that issue in *Federation of Musicians v. Carroll*, 391 U.S. 99, 110. For the reasons stated at Pet. 28-29, it would be inconsistent with the national labor policy to confine the exemption to agreements concerning mandatory bargaining subjects. This issue of the relationship between the antitrust and labor laws would, even if standing alone, warrant plenary consideration by this Court.

CONCLUSION

For the foregoing reasons, if the merits of the Petition for Writ of Certiorari are reached despite the settlement agreement, the Petition should be granted.

Respectfully submitted,

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